

TO: The Federal Communications Commission

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CC: U.S. Senate Committee on Commerce, Science, & Transportation—
Subcommittee on Communications
The House Committee on Energy and Commerce
The Subcommittee on Telecommunications and the Internet
The Honorable Maria Cantwell
The Honorable Dennis Kucinich
The Honorable Patricia Murray
The Honorable James McDermott

DATE: May 1, 2007

RE: MB Docket No. 06-121
Local Radio Ownership Limits and Localism

I am strongly opposed to any further deregulation of the local radio ownership rules beyond their current limits. The sweeping changes that the Telecommunications Act of 1996 ushered in have wrought a devastating era on radio in general and localism specifically. One important aspect of radio that has been lost in the deregulation shuffle is the value of hearing local voices – real local voices – comment on the day’s issues. In this comment, I argue that localism is a public good that must be protected by the FCC. I wholeheartedly agree with the Third Circuit’s ruling in *Prometheus*, and I believe that the FCC cannot justify relaxing media ownership rules further without acting in an arbitrary and capricious manner. Any further relaxation of the local ownership rules only helps the interests of large media corporations and would represent a clear step away from protecting the public interest. Thus, if the FCC allowed further deregulation, it would be acting ultra vires to its enabling statute.

This comment starts with a simple observation. Relaxed local media ownership rules equals fewer companies competing in the radio market. A radio market with fewer

station owners means that fewer voices and viewpoints are heard.

First Principles: Free Speech and the Public Trust

Starting from first principles – the First Amendment – the need to reverse deregulation becomes clear. The concept of a robust “marketplace of ideas,” a core rationale behind the First Amendment, is on life support with respect to broadcast radio. The marketplace of ideas is the engine that powers the informed and self-reliant citizenry required to run a nation whose sovereign is the People. As the Supreme Court eloquently stated, “the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.” *Associated Press v. U.S.*, 326 U.S. 1 (1945). Clearly, The 1996 Act reflects a change in attitude towards this quaint notion of what is essential to maintaining a free society, but it is time for the FCC to apply a tourniquet to the ownership rules, so that the FCC may begin to reverse the 1996 Act’s ill-conceived effects.

The other first principle is that the “broadcast license is a public trust.” *Office of Communication of United Church of Christ v. FCC*, 590 F.2d 1062 (D.C.Cir.1978)(Burger, J). Related to this concept is the FCC’s duty to ensure that our nation’s scarce airwaves are used in a way that the serves “the public convenience, interest, or necessity.” *National Broadcasting Corporation v. United States*, 319 U.S. 190 (1943). Broadcast licenses are not property interests, *Monroe Communications Corp. v. FCC*, 900 F.2d 351 (D.C.Cir.1990), and the FCC should not treat them as such. Furthermore, “broadcasters act as proxies for the community.” *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969).¹

¹ Media Bureau Staff Attorney Professor John W. Berresford takes us to task for taking the position that the broadcast spectrum is a public trust property right, but his argument does not pass the laugh test. He first belittles the theory by calling the scarce resource, “The People’s Airwaves

When blended, the first principles above make clear that the broad deregulation of our nation's airwaves strikes at the very fabric of our Republic. Our nation's democratic health depends on robust debate at the local level. Local control that provides diverse viewpoints and robust debate is of the utmost public interest.

Deregulation and its Effect on Localism

When referring to media markets, the term localism refers to "concerns about local aspects of broadcasting...includ[ing] provid[ing] local news, public affairs and...local culture." Simon P. Anderson, "Localism and Welfare," (2005)("Anderson"). But before diving into the effects of deregulation on localism, a quick look at the radio market will provide relevant background for this comment. From March 1996 to March 2003, the number of owners of our nations radio broadcast stations decreased by 35%, from 5,133 to 3,323. "Review of the Radio Industry, 2003," FCC Media Bureau (2003). While the number of stations in America has increased in that same period, the average number of radio broadcast owners in metropolitan areas has decreased from 13 to 9, a 31% drop. *Id.*

What these numbers fail to show, however, are the effects of deregulation on local control of the radio station with respect to the personnel who are actually in the booths day-in, day-out playing music, talking, broadcasting and commenting on news events, and hosting debate. The sad state of radio broadcasting can be best seen through the example of Clear Channel Communications and its radio network operations.

Rationale," implying that there is something socialist to the reasoning. The basis for his assertion is that there is no "no law" that clearly states that the Spectrum is a public trust property. But Professor Berresford only looks to positive, statutory law for his bald assertion. Obviously, the Supreme Court and Congress believe that the Spectrum is a public trust as a matter of common law, which can be seen in the language that the Court used in *NBC* and *Red Lion*, and which Congress itself used in the Communications Act. The most salient analogy is to the common law public trust doctrine governing waterways and seashores. See John W. Berresford, "The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed," Media Bureau Staff Research Paper No. 2005-2 (March 2005).

Clear Channel Communications has been the biggest “winner” since the Telecommunications Act of 1996 was passed, surging from 43 radio stations to nearly 1,200 in the last decade. Clear Channel has created “fast-food” radio networks, national brands that can be recognized across the country whether you’re in Seattle or Washington D.C. For instance, KISS is Clear Channel’s designation for a contemporary music station.

Clear Channel spends a lot of money promoting the KISS FM brand identity. That's because the company sees it as being akin to say, McDonalds. Anywhere you go in the country, you know what to expect on a McDonalds menu. Likewise, in 47 cities where Clear Channel owns stations, you know what to expect from KISS FM.

NOW with Bill Moyers, April 26, 2002, “Virtual Radio,”

http://www.pbs.org/now/transcript/transcript_clearc.html (last visited May 1, 2007).

But that’s just the station format; many communities had a contemporary music station in its market before Clear Channel and the 1996 Act. What those communities did not have was a robotic, remotely operated contemporary music station in its market. Clear Channel’s Prophet Systems, <http://www.prophetsys.com/>, allows complete remote station automation. See “’Good Mornin’ (Your Town Here),” *Wired Magazine*, August 2, 2006, <http://www.wired.com/techbiz/media/news/2002/08/54037>. To be sure, automated radio systems have had their fair share of bugs. During the 9/11 attacks some automated stations did not have enough personnel to run the station manually and provide updates to concerned citizens; instead, the station continued to play an eerie soundtrack as though nothing had happened. *Id.* Today, the systems are largely imperceptible, except when you try to call a real human being on the phone. *Id.* Getting a DJ to play a request for a friend or a loved one over the air is thing of the past in many

communities.

This lost localism is the cost citizens pay for the “efficiencies” of a fully automated radio broadcast market. It wasn’t meant to be this way because the radio spectrum is a public good.

Loss of a Public Good

We’ve lost sight of the value that localism plays with respect to our broadcast markets. Lost Localism is a quintessential market failure that economists refer to as a “public good,” or “the tragedy of the commons.” A public good cannot be divided and the producer cannot bar non-payers from enjoying the benefits. Thus, the producers have no incentive to offer it. Therefore, if it is offered, the government must do it. For over 60 years the government stepped in and provided this good via the Communications Act of 1934 by limiting ownership of national markets. This forced stations to be operated from the towns and cities where they were located.

This public good has evaporated in many areas and deserves protecting from further erosion. The Supreme Court has already ruled that the FCC has authority to act in the public interest. *NBC; Red Lion*. Part of the public interest includes protecting localism. When deregulation passed, the country suffered a massive loss of this public good. It is the duty of the FCC to stop further losses.

Conclusion

Halt further radio market ownership deregulation. Our nation’s health depends on localism in the radio broadcast market. I strongly urge the FCC to renew its mandate to act in the public interest.